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Nos. 83-1217, 83-1218

In The

Supreme Court of the United States

October Term, 1983

WILLIAM DiBUONO, ASSIGNMENT JUDGE, et als.,
Petitioners,

v.

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and other persons similarly situated,
Cross-Petitioners,

v.

WILLIAM H. FAUVER, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS OF THE STATE OF NEW JERSEY,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

This class action was initiated on March 25, 1981 when inmates at the Union County Jail (hereinafter cross-petitioners) filed suit under 42 U.S.C. §1983 against county officials alleging that conditions at the jail violated their constitutional guarantees to due process, equal protection and freedom from cruel and unusual punishment (JA5).*

*This notation refers to the joint appendix filed with the Third Circuit Court of Appeals.

The inmates, who include both pre-trial detainees and those sentenced to county or State prison terms, sought an injunction to reduce the inmate population. On the same date, Union County officials (hereinafter petitioners) filed a third party complaint against the Commissioner of New Jersey's Department of Corrections (hereinafter respondent), attributing any unconstitutional conditions at the jail to the respondent's refusal to accept custody of inmates sentenced to State prison pursuant to N.J.S.A. 2C:43-10(e), which mandates their removal to State prison within fifteen days after sentencing (JA23).

The State of New Jersey is currently in the midst of a serious statewide prison overcrowding emergency (JA 66) under which both the State prison system and the jail systems of all the counties in the State are housing inmates beyond their design capacities (1T5-22 to 1T7-4; 1T 60-20 to 25).* As a result, former Governor Brendan T. Byrne, promulgated Executive Order 106 on June 19, 1981, which declared a state of emergency due to the serious overcrowding of New Jersey's jails and suspended operation of N.J.S.A. 2C:43-10(e), which requires the removal of state prisoners from county facilities within fifteen days of sentencing, to achieve flexibility in the assignment of inmates (JA586). Pursuant to the Executive Order, respondent was authorized to designate the place of confinement for all State and county inmates, whether pre-trial detainees or sentenced. Given this authority, respondent designated Union County Jail as the facility to confine State prisoners sentenced in Union

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*There are two separate volumes of transcripts from two separate days of testimony. The separate volumes will be referred to herein as follows:

"1T—" for February 16, 1982 and "2T—" for February 18, 1982.

County and determined that, with structural modifications, it could house inmates above its rated capacity.*

On October 22, 1981, the District Court entered a consent judgment between petitioners and cross-petitioners which specified that the maximum capacity of Union County Jail was 238 and provided a mechanism whereby the District Court could release prisoners if this maximum were exceeded (JA486). Respondent was not a party to this order. Although respondent sought on November 10, 1981, to vacate the consent judgment because it contravened Executive Order 106, this motion was stayed by the District Court pending resolution of *Worthington v. Fauver*, 88 N.J. 183 (1982), where the validity of the Executive Order was in issue. On January 6, 1982, New Jersey's Supreme Court unanimously held that this Executive Order constituted a valid exercise of the Governor's authority under the Civil Defense and Disaster Control Act, N.J.S.A. App. A:9-30 *et seq.* *Ibid.*, at 197. The District Court then deferred decision on respondent's motion and referred this case to a Special Master.

The Special Master filed his report and recommendations on March 1, 1982 (JA63). He found that Union

*New Jersey further addressed this prison overcrowding emergency by expanding its capacity to house inmates through lease arrangements and through the addition of approximately 2000 trailer cells installed at various State facilities. Current plans call for the addition of a 450 bed prison in Camden, New Jersey, which is anticipated for completion in 1985, and a 1000 bed prison in Newark, New Jersey. In addition, the Correctional Facilities Construction Bond Act of 1982 was passed in November 1982 and authorized the creation of a 170 million dollar debt for the construction and restoration of prisons. *P.L.* 1982, c. 120. Pursuant to this Bond Act, at least 36 million dollars has been appropriated to the counties. *P.L.* 1983, c. 130. Total appropriations to New Jersey's Department of Corrections for site purchase, planning, construction and renovation exceed 42 million dollars. *Ibid.*

County Jail contains 218 general population cells, each equipped with a single bed and combination toilet/sink fixture. These cells measure 39 square feet.* There are also 10 detention/isolation cells which contain a single bed and range from 83 to 113 square feet, a work release dormitory, a female dormitory, a dormitory in the recreational area and a dormitory in the kitchen area. There are also 15 new vacant cells in the intake area, each containing 72 square feet (JA67-JA69).

The general population cells are arranged in tiers.** Each cell opens onto a common corridor which is 5½′ wide and ranges between 40′ and 70′ in length, depending upon the number of cells in a tier (JA67). Each corridor is equipped with one television and a phone (JA67-JA68). During all hours, except from 10 p.m. to 6 a.m., the inmates are allowed access to the common area, as well as their cells (JA67). Inmates are permitted to make phone calls, receive mail without censorship, receive visitors and perform work assignments on a voluntary basis (JA527-JA 533). Specific service programs include G.E.D. and Vo-Tech educational programs, counseling programs, as well as alcoholism and drug programs (JA549). A general library and a law library are also available (JA549).

On February 15, 1982, the Special Master found that the population at Union County Jail was 359, 81 of whom were sentenced and awaiting transfer to State prison (JA69). To accommodate this population, county jail officials placed two inmates in a portion of the general

*Two cells measure 47 square feet.

**Twelve tiers contain 12 cells and the cell corridors in those tiers measure approximately 5½′ x 60′ or 330 square feet each. Five tiers contain 8 cells each and the cell corridors in those tiers measure 5½′ x 40′ or 220 square feet each. Two tiers contain 17 cells each and the cell corridors in those tiers measure 5½′ x 70′ or 385 square feet each (JA67).

population cells. In cells containing two inmates, one was required to sleep on a mattress placed on the floor at night (JA70). At the jail's highest population level, less than 50% of the cells contained two inmates (JA69). The Special Master projected that if double-celling occurred in 50% of the cells, the square footage per inmate, during daytime hours when prisoners had access to cell corridors, would be 45 square feet in the 12-cell tiers, 44 square feet in the 8-cell tiers and 41 square feet in the 17-cell tiers (JA72).

The Special Master found that the increased inmate population negatively affected some services. Specifically, he found that recreation had been limited to one hour, two times per week, rather than one hour daily (JA75) and visitation periods had been shortened to 5 to 10 minutes, three times per week, from the usual period of 15 to 30 minutes (JA76). Moreover, jail officials had not completely complied with N.J.A.C. 10A:31-3.13(b) (5), which requires that inmates be provided with clean clothes weekly and clean towels daily (JA76). Finally, jail officials were not conducting medical screenings of inmates prior to their admission to the general population (JA77). Despite this, the Special Master found that prison officials did continue "to provide the inmates with counseling programs, chapel services, educational activities, access to the general library and law library and other related programs" although staffing was limited (*Ibid.*). Furthermore, sanitary conditions of the inmate housing area and kitchen were satisfactory, as were dietary services (*Ibid.*). Although overcrowded conditions had resulted in scattered instances of fighting, the Special Master did not find "nor do any of the parties assert that the increased tensions in the jail amount to a serious security problem at this time" (JA78).

It is significant that neither petitioners nor cross-petitioners filed objections to the Special Master's findings of fact or conclusions of law (Cr. Pet. at 19).* Contrary to the cross-petitioners' present allegations, there were no findings that the Union County Jail facility was decaying (Cr. Pet. at 6), antiquated (Cr. Pet. at 8) or in a substantial state of disrepair. There were no findings that the cells lacked water (Cr. Pet. at 7), that shower facilities were inadequate (Cr. Pet. at 8) or in disrepair or that the toilets were substantially in disrepair. A fair assessment of the record reveals that it is not replete with "severe safety, health and institutional crises. . . ." (Cr. Pet. at 10).**

The Special Master concluded that six practices at Union County Jail violated the due process rights of pre-trial detainees. Specifically, the Due Process Clause was violated by (1) confining pre-trial detainees, for more than a few days, in detention cells without adequate sleeping arrangements, (2) requiring detainees to sleep, for more than a few days, on mattresses placed on the floor whether in a cell or (3) in other locations throughout the jail, (4) permitting detainees to wear uniforms that were not cleaned weekly, (5) failing to medically screen new detainees and (6) requiring detainees to remain in cells or cell corridors except for a few hours a week, without meaningful recreational opportunities (JA82-JA83). Of these practices, the Special Master concluded that two violated the Eighth Amendment rights of sentenced inmates,

*This notation refers to the cross-petition for *certiorari* filed by Union County Jail Inmates, *et als.*

**Because cross-petitioners did not take exception to the Special Master's findings, it is highly improper for them to attempt to dispute these factual findings in the present proceeding or worse, to assert the Special Master made factual findings such as cross-petitioners have represented to this Court.

namely, (1) requiring sentenced inmates to sleep on floor mattresses in any part of the jail and (2) confining more than one sentenced inmate in detention cells equipped with one bed (JA86-JA87). Based on these findings, the Special Master recommended the removal of State prisoners (JA93-JA94) and set the jail's capacity at a maximum of 244 (JA90). He reached no conclusion regarding the constitutionality of double-celling inmates (JA90).

Detailed exceptions to the Special Master's report were filed by respondent (JA99). Respondent argued that the Special Master improperly ordered the release of State inmates where the objectionable conditions could be remedied by the county. He recommended the installation of bunk beds to eliminate the use of floor mattresses and increase recreational space.* Furthermore, experts for the Department of Corrections testified that, with certain modifications, the jail could house 369 inmates without the necessity for double-bunking (JA110). Contrary to cross-petitioners' allegation, respondent never contended that it was appropriate to double bunk each cell in the jail, nor is such action contemplated (Cr. Pet. at 23).

On April 27, 1982, the District Court held that conditions at Union County Jail violated the Eighth and Fourteenth Amendments. *Union County Jail Inmates v. Scanlon*, 537 F. Supp. 993 (D.N.J. 1982) (Cr. Pet. App. F).** The District Court adopted the Special Master's findings of fact in whole, but modified the proposed conclusions of law (Cr. Pet. App. F at 83). It concluded that there had been no express intent to punish pre-trial detainees (Cr. Pet. App. F at 92). Nevertheless, the overcrowded condi-

*Under respondent's recommendation, recreational floor space would be increased from 720 square feet to 1758 square feet (JA190).

**This notation refers to the appendix filed by cross-petitioners.

tions were held to be excessive in relation to the legitimate governmental purposes for imposing such conditions (Cr. Pet. App. F at 93). Specifically, the District Court held that the use of floor mattresses was "unsanitary, dehumanizing and shocking," but that such use could be justified during an emergency for a limited period (Cr. Pet. App. F at 95). The court rejected respondent's double-celling recommendation based strictly on spatial considerations (Cr. Pet. App. F at 97). It noted that 19.5 square feet of sleeping space was roughly equivalent to quadruple bunking in *Bell v. Wolfish*, 441 U.S. 520 (1979), and that, therefore, it could not pass constitutional muster. Moreover, the double-celling recommendation was rejected because the District Court doubted that recreation would improve, even with additional space, and because overcrowding had reduced visitation privileges (Cr. Pet. App. F at 100 to 102).

With regard to sentenced inmates, the District Court concluded that the use of floor mattresses constituted cruel and unusual punishment (Cr. Pet. App. F at 104). Furthermore, the court rejected double-bunking because it deprived inmates of habitable shelter. Specifically, the court held that 19.5 square feet of nighttime space failed to meet any contemporary standard of decency (Cr. Pet. App. F at 105).

The District Court thereupon invalidated the applicability of Executive Order 106 to Union County Jail pursuant to the Supremacy Clause of the Constitution and ordered that respondent comply with N.J.S.A. 2C:43-10(e), by removing State sentenced prisoners within fifteen days after sentencing (Cr. Pet. App. F at 107). Petitioners were ordered to implement a medical screening program, reinstate the recreational and visitation programs to prior

levels and supply clean clothes and towels in accordance with N.J.A.C 10A:31-3.13(b) (5) (Cr. Pet. App. F at 110-to 11). Moreover, petitioners represented to the court that additional medical and dental personnel would be hired and lighting improved (Cr. Pet. App. F at 111). The District Court established a population maximum for the jail of 259 (Cr. Pet. App. F at 111). An order to this effect was entered on April 27, 1982 (Cr. Pet. App. G).

Respondent filed a Notice of Appeal on May 25, 1982 (JA361). Petitioners did not appeal any aspect of the District Court's order. On August 11, 1983, the Court of Appeals for the Third Circuit reversed the District Court by holding that conditions at Union County Jail did not violate the due process rights of pre-trial detainees and did not constitute cruel and unusual punishment for sentenced inmates. *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3rd Cir. 1983) (Cr. Pet. App. D).

With regard to pre-trial detainees, the Circuit Court acknowledged that there was no dispute that the use of floor mattresses was unconstitutional (Cr. Pet. App. D at 71). However, the Circuit Court concluded that the District Court had improperly rejected respondent's double-celling recommendation. Following the analysis utilized in *Bell, supra*, the Circuit Court determined that the overcrowded conditions at the jail were due to legitimate governmental purposes and that, with the implementation of double-celling, conditions would not be excessive in relation to these purposes. In determining whether jail conditions were excessive, the Circuit Court specifically held that it was proper to examine the constitutionality of the conditions at Union County Jail in light of the totality of circumstances which had resulted due to overcrowding. Utilizing the totality test, the Circuit Court concluded that

respondent's remedial proposal would sustain constitutional challenge. Specifically, the proposal would avoid the use of floor mattresses and reclaim lost recreational area (Cr. Pet. App. D at 56). Moreover, because petitioners did not appeal the District Court's April 27, 1982 Order, the effects of overcrowding would be mitigated by one hour of recreation per day, visitation privileges of 15 minutes three times per week and the provision of clean clothes and towels in accordance with applicable regulations (*Ibid.*). Furthermore, the court noted that pretrial detainees were generally confined at Union County Jail for less than 60 days (*Ibid.*).

With regard to sentenced inmates, the Third Circuit similarly concluded that conditions at Union County Jail would not violate the Eighth Amendment if respondent's recommendations were accepted and petitioners discharged their obligations pursuant to the District Court's Order (Cr. Pet. App. D at 66). Having sustained the constitutionality of double-celling pre-trial detainees, the Third Circuit held, *a fortiori*, that the same conditions satisfy constitutional standards for sentenced inmates under *Rhodes v. Chapman*, 452 U.S. 337 (1981). However, the Circuit Court also concluded, following an analysis of the totality of conditions, that the Eighth Amendment was not violated and that the District Court erred in relying exclusively on per capita square feet recommendations. The Third Circuit held that neither the number of inmates in one cell nor the amount of space provided for an inmate in a dormitory alone determines whether confinement is cruel and unusual punishment, but that also relevant is how much time prisoners spend in their cells each day, the opportunities that inmates have for activities outside their cells and the general state of repair and function of the facilities (Cr. Pet. App. D at 63 to 65).

The Court of Appeals for the Third Circuit vacated those provisions of the District Court's April 27, 1982 Order which had required the removal of State prisoners within fifteen days after sentencing and which had authorized a maximum population capacity (Cr. Pet. App. D at 69 to 70). The balance of the April 27, 1982 Order was remanded to the District Court for reconsideration and modification (*Ibid.*).

The Circuit Court entered judgment on August 11, 1983 (Cr. Pet. App. E). On October 5, 1983, that court denied cross-petitioners' petition for a rehearing en banc (Cr. Pet. App. A). This Order was amended on October 6, 1983 and one judge filed a statement sur denial (Cr. Pet. App. B).

ARGUMENT

POINT I

Certiorari Should Not Be Granted To Review A Judgment By A Circuit Court Of Appeals Which Is Not Final.

It is a fundamental concept that review by the United States Supreme Court on writ of *certiorari* "is not a matter of right, but of judicial discretion. . . ." *Supreme Court Rule* 17. Given such discretion, it has been the venerate practice of the Supreme Court to grant the writ "only when there are special and important reasons therefor," *Ibid.*, and, generally, only when the judgment of the court below is final. *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-8 (1916); *American Construction Co. v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372 (1893); *Chicago & Northwestern Railway Co. v. Osborne*, 146 U.S. 354 (1892). The lack of a final judgment

is a factor which, standing alone, may constitute a basis for a denial of the writ. *Hamilton-Brown Shoe, supra,* 240 U.S. at 258. Therefore, it is only in the exceptional case where *certiorari* will be granted prior to a final judgment by a circuit court. *American Construction, supra,* 148 U.S. at 384.

In this case, the decision rendered by the Circuit Court is not final* because it specifically remanded this matter to the District Court. *Union County, supra,* 713 F.2d at 1003 (Cr. Pet. App. D at 70). Although various portions of the District Court's April 27, 1982 Order were vacated by the Circuit Court,** the court remanded the remaining portions of the District Court's order "for reconsideration and modification, if necessary, in light of our foregoing discussion, and for such other proceedings as are consistent with this opinion." (Cr. Pet. App. D at 70). The court noted that, on remand, the District Court would not be precluded from supplementing the record, could further develop "the manner, and time, in which the Commissioner's remedial proposals are to be implemented" and could

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*A final decision has been defined as "one that terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment." *Catlin v. United States,* 324 *U.S.* 229, 233 (1945).

**The Circuit Court vacated the following portions of the District Court's April 27, 1982 Order:

1. Paragraph (1) (ordering removal of state prisoners by July 1, 1982);
2. Paragraph (2) (ordering compliance with *N.J.S.A.* 2C: 43-10(e));
3. Paragraph (f) (confirming the "maximum capacity" for the Jail), paragraph (g) (giving the Commissioner until July 1, 1982 to achieve that population figure), and paragraph (h) (empowering the County to "notify the Department of Corrections to remove any State prisoners who have remained at the facility beyond the statutory fifteen day period since sentence was imposed") (Cr. Pet. App. D at 69 to 70).

take other steps deemed necessary to comply with the constitutional requirements of *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Rhodes v. Chapman*, 452 U.S. 337 (1981) (*Ibid.*). In short, the Third Circuit's remand permits a complete re-examination of jail conditions by the District Court, provided that such examination accords with the principles set forth by the Circuit Court.

A spectre of problems could arise were the Supreme Court to grant *certiorari*. Were this Court to uphold the Circuit Court, the order of remand creates the real possibility that additional issues may be raised. There is no question that delay will be engendered if issues are raised on remand which are subject to further review by the Supreme Court. Moreover, there is no certainty that the alleged constitutional issues identified by petitioners are ripe for determination until there has been compliance with the Circuit Court's order of remand. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967).

This case does not raise unique and original constitutional issues. Rather, it concerns questions previously addressed by the Supreme Court in *Bell* and *Rhodes*. Given the lack of special and important reasons for granting *certiorari*, this is not a case which would warrant granting such review prior to a final decision by the Circuit Court. For all the aforementioned reasons, the petition and cross-petition for *certiorari* should be denied.

POINT II

Certiorari Should Not Be Granted Where The Decision Of The Third Circuit Court Of Appeals Does Not Conflict With Applicable Decisions Of The Supreme Court Which Have Considered The Constitutionality Of Prison Conditions Resulting From Overcrowding.

This case does not exhibit unique or compelling characteristics such as would warrant review on *certiorari* by the Supreme Court. Applicable court rules provide that the discretionary writ of *certiorari* will only be granted where there are "special and important reasons" and these reasons may include "[w]hen a . . . federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court." *Supreme Court Rule* 17.1. In order to obtain *certiorari* where such a conflict is alleged, the conflict must be "direct and irreconcilable and must be demonstrably so." Stern and Gressman, *Supreme Court Practice*, (5th ed. 1978), §4 at 273.

There is no direct and irreconcilable conflict, in this case, because the Court of Appeals for the Third Circuit faithfully adhered to the principles set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Rhodes v. Chapman*, 452 U.S. 337 (1981). Therefore, neither petitioners nor cross-petitioners have articulated a rationale which would warrant *certiorari* in this matter.

A. The Third Circuit has strictly adhered to the principles and analysis set forth in Bell v. Wolfish, 441 U.S. 520 (1979).

In *Bell v. Wolfish, supra*, 441 U.S. at 520, the Supreme Court held that double-celling pre-trial detainees at the Metropolitan Correctional Center (MCC) did not constitute a violation of the Due Process Clause. *Bell* reasoned that ". . . the proper inquiry is whether those conditions amount to punishment of the detainee," *Ibid.*, at 535, because punishment prior to an adjudication of guilt is forbidden by the Due Process Clause.

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . Absent a showing of an expressed intent

> to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." [*Ibid.*, at 538, quoting from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)].

The Court recognized that insuring the presence of detainees at trial and the effective management of detention facilities, are legitimate governmental purposes. *Ibid.*, at 539-40.

To determine whether double-celling was excessive in relation to these legitimate purposes, *Bell* examined the size of the cells at MCC (75 square feet), the length of time that inmates were locked in their cells (11 p.m. to 6:30 a.m.) and the length of time that the detainees were held (85% released within 60 days). *Ibid.*, at 541. This Court denounced the principle that the Constitution requires "one man, one cell" and concluded that

> [w]hile confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record. [*Ibid.*, at 542].

Although *Bell* recognized that the facility at MCC was "advanced and innovative," *Ibid.*, at 525, there is no evidence that it intended to restrict the application of its analysis to modern detention facilities. Rather, the Court's examination of whether particular conditions amount to punishment is applicable to all detention facilities. Cross-petitioners' contention that this Court has not decided what analysis is appropriate for "traditional jails," is

groundless (Cr. Pet. at 26). Moreover, other cases that have applied *Bell* do not support cross-petitioners' contention that *Bell's* rationale is inapplicable in the context of a jail whose conditions are less modern than MCC.

Utilizing the analysis set forth in *Bell*, the Third Circuit similarly held that double-bunking inmates at Union County Jail would not violate the due process rights of pre-trial detainees. *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983) (Cr. Pet. App. D). First, the Special Master and District Court both found that there was no express intent to punish inmates at the jail and this finding was not questioned on appeal (Cr. Pet. App. D at 47). Second, the Circuit Court agreed with the District Court, that "the effective management of a detention facility during a statewide prison overcrowding emergency, along with 'the interests of local and state governments in not releasing [inmates] onto the streets'," constitute legitimate governmental interests which could justify conditions at the jail (*Ibid.*). Moreover, the District Court had found that the jail's overcrowding was rationally related to the objective of not releasing inmates and "an unavoidable incident of the jail officials' efforts to effectively manage the facility during a statewide prison overcrowding emergency." *Union County Jail Inmates v. Scanlon*, 537 F. Supp. 993 (D.N.J. 1982) (Cr. Pet. App. F). This rational relationship was not challenged on appeal (Cr. Pet. App. D at 47). Third, the Circuit Court examined whether the conditions resulting from overcrowding were excessive in relation to the purposes assigned for them, *i.e.*, the final prong of the Supreme Court's analysis in *Bell*.

It was not contended on appeal that, requiring inmates to sleep on mattresses placed on the floor near a toilet,

was constitutional (Cr. Pet. App. D at 51). Rather, the issue on appeal was whether the respondent's recommendation, that pre-trial detainees be double-celled by installing a second bed, would satisfy constitutional guarantees where the county was held to its obligation under the consent agreement. The Circuit Court rejected the District Court's position that double-celling would not pass constitutional muster and held that if respondent's recommendations were adopted, the Due Process Clause would not be violated (Cr. Pet. App. D at 55). Contrary to *Bell's* emphasis on multiple factors such as cell size and length of confinement, the District Court had improperly rejected respondent's recommendation based upon spatial considerations alone. The Circuit Court concluded that this strictly quantitative assessment was improper because it failed to consider the effect of mitigating factors, especially the expansion of recreational areas (*Ibid.*).

The Third Circuit specifically adopted a totality of the circumstances test to determine if conditions at Union County Jail satisfied constitutional standards. (Cr. Pet. App. D at 55). Focusing upon the findings of the Special Master, the Third Circuit held that if petitioners satisfied their obligations under the consent agreement, which included the provision of daily recreation, clean clothes and towels, increased visitation opportunities and medical screening for new inmates, and double-bunking were utilized to eliminate floor mattresses, respondent's remedial proposal " . . . would effectively cure all of the conditions that were of particular concern to the Special Master." (Cr. Pet. App. D at 56). The court acknowledged that the cells were small, but conditions at the jail were not unconstitutionally excessive because of mitigating circumstances, such as the opportunity for increased recreation

and visitation, the existence of inmate programs which permit inmates to leave the cell block and the fact that most detainees are confined 60 days or less (Cr. Pet. App. D at 56).*

Although the facts of *Bell* are distinguishable from the present case, *Bell* does not establish the conditions at MCC as a constitutional minima. The question here is whether the analysis of the Third Circuit in *Union County* conflicts in a direct and irreconcilable manner with *Bell* or misapplies the principles set forth therein. The above discussion leaves no doubt that the Third Circuit followed the analysis and principles of *Bell* without deviation. There is no conflict or misapplication such as would warrant a grant of *certiorari* in this case.

B. The Third Circuit has strictly adhered to the principles and analysis set forth in Rhodes v. Chapman, 452 U.S. 337 (1981).

Petitioners and cross-petitioners have failed to demonstrate the existence of a direct and irreconcilable conflict between the Third Circuit's opinion in *Union County* and *Rhodes v. Chapman*, 452 U.S. 337 (1981). In *Rhodes*, this Court held that double-celling sentenced inmates at the Southern Ohio Correctional Facility (SOCF) did not constitute cruel and unusual punishment in violation of the Eighth Amendment. The *Rhodes* Court noted that the

*The argument that the Circuit Court isolated certain factors (living space, double-bunking and the floor mattress problem) (Cr. Pet. at 32 to 33) from the totality of circumstances is not supported by a fair reading of the opinion. The Third Circuit examined the specific conditions that the Special Master and District Court found to be constitutionally infirm in light of all the circumstances, which included the respondent's remedial plan, the county's obligations under the consent agreement and other mitigating circumstances. (Cr. Pet. App. D at 55-56). The Circuit Court did not isolate any one factor, such as space, contrary to the approach utilized by the District Court.

Eighth Amendment would be violated by conditions which "alone or in combination"* deprive inmates of the "minimal civilized measure of life's necessities," *Ibid.*, but conditions at SOCF had not generated such "unquestioned and serious deprivations of basic human needs." *Ibid.* In *Rhodes*, as in the present case, there were no factual findings that inmates were genuinely deprived of food, medical care, sanitation or subjected to a disproportionate increase in violence. *Ibid.*, at 342-3. Indeed, the Special Master's findings, adopted as noted by the District Court, were to the contrary (JA77 to JA78). The Supreme Court approved double-celling in *Rhodes* where cells were 63 square feet, prisoners could choose between confinement in their cells or dayrooms, and where the majority of inmates were serving long-term sentences. At no time, however, did this Court imply that the conditions present in *Rhodes* constituted a constitutional minima.

Pursuant to the *Rhodes* analysis, the Third Circuit specifically adopted a totality of the circumstances approach to the Eighth Amendment challenge and reversed the District Court, which had based its finding of unconstitutionality, solely upon cell size (Cr. Pet. App. D at 61). Because the District Court concluded that double-bunking deprived sentenced inmates of habitable shelter, the Circuit Court examined the totality of circumstances "that bear on the nature of the *shelter* afforded to sentenced inmates."** (Cr. Pet. App. D at 62). By focusing on

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*In his concurring opinion, Justice Brennan noted this language and inferred therefrom that the Court had adopted a totality of the circumstances approach for analyzing Eighth Amendment challenges. *Ibid.*, at 363, n. 10.

**The Circuit Court's analysis does not distort this Court's reasoning in *Rhodes* as alleged by cross-petitioners (Cr. Pet. at 51 to 53). The District Court concluded that sentenced inmates

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spatial considerations alone, the District Court failed to consider other mitigating factors which were considered by the Circuit Court, such as the relatively short length of confinement for sentenced inmates (Cr. Pet. App. D at 63 to 64), the short time that inmates are actually locked in their cells (Cr. Pet. App. D at 64 to 65), the opportunities that inmates have for activity outside their cells (*Ibid.*) and the generally good state of repair of facilities at the jail (Cr. Pet. App. D at 65). In addition, neither the Special Master nor the District Court found that inmates were deprived of basic human needs such as food, medical care, sanitation or security (JA77-JA78). The physical condition of the jail was found to be adequate; there were no factual findings that plumbing, ventilation, or heat were inadequate. Noise levels were not excessive, nor was there evidence of insect or rodent infestation.*

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were deprived of habitable shelter; they were not deprived of other necessities such as food, clothing or medical care. As noted, the Special Master found those needs (with the exception of laundry and medical services, which would be improved by implementation of the consent decree) were being met in appropriate fashion (JA77 to JA78). Therefore, the Circuit Court correctly examined the totality of circumstances that bear on the condition that was found unconstitutional.

*Contrary to the allegation by petitioners and cross-petitioners, the Circuit Court did not engage in a *de novo* review of the record. In fact, respondent did not challenge the findings of the Special Master or the District Court on appeal. Therefore, the Third Circuit had no occasion to dispute the factual findings of the Special Master because this issue was not before it.

A fair reading of the Third Circuit opinion shows that it did not alter the findings of the Special Master (Cr. Pet. at 64). What cross-petitioners fail to note is that Union County (petitioners) did not appeal from the District Court's order which obligated it to provide one hour of recreation per day, clean clothes and towels, and reinstate the visitation program (Cr. Pet. App. F at 111). Consequently, the Circuit Court did not alter the findings

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Given all of these circumstances, the Circuit Court held that double-celling, in conjunction with the execution by the county of its obligations under the consent agreement, would not violate the Eighth Amendment (Cr. Pet. App. D at 66).

It is simply inaccurate to assert that the Third Circuit's opinion in this case conflicts with *Rhodes*, because the Circuit Court specifically adopted the legal principles and analysis set forth by this Court in *Rhodes*. Rather, it is the District Court opinion which conflicts with *Rhodes*, because it myopically focuses upon one factor—cell size—while it ignores other mitigating conditions. The Third Circuit properly rejected this narrow focus in order to comply with *Rhodes*.

In short, there is no conflict between this case and opinions of the Supreme Court which have construed the

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of the Special Master; rather, these conditions were to be remedied by the county and the necessary (and plainly warranted) assumption was that the county would carry out its obligations. The Circuit Court assessed the constitutionality of respondent's remedial scheme in conjunction with the county's obligation under the consent agreement (Cr. Pet. App. D at 56 and 66). Therefore, there has been no impermissible disregard of lower court findings by the reviewing circuit court such as would warrant the grant of *certiorari* to correct.

Furthermore, the Supreme Court's grant of *certiorari* in *Bose Corp. v. Consumers Union, Inc.*, 692 F. 2d 189 (1st Cir. 1982), *cert.* granted, 51 *U.S.L.W.* 3774 (1983), does not constitute a basis for granting *certiorari* in this case because the issues raised by *Bose* are distinguishable. The question in *Bose* is whether a court of appeals is bound by the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) when reviewing a district court's finding of actual malice in a libel action. See 51 *U.S.L.W.* 3625 (1983). The standard of review, of course, presents an appropriate legal question for review. However, there is no dispute here that the clearly erroneous standard of Rule 52 is applicable in this case. The contentions of the parties go to what result such a review produces on the record in this case, hardly a question of monumental import for this Court.

Eighth Amendment's prohibition against cruel and unusual punishment, *Rhodes, supra; Estelle v. Gamble*, 429 U.S. 97 (1976); *Hutto v. Finney*, 437 U.S. 678 (1979), for the alleged deprivations here, simply do not rise to the level which this Court has theretofore required in order to find a violation of that Amendment.*

POINT III

Certiorari Should Not Be Granted Where The Decision Of The Third Circuit Court Of Appeals Does Not Conflict With Decisions By Other Federal Circuit Courts Of Appeal Which Have Considered The Constitutionality Of Double-Celling Pre-trial Detainees And Sentenced Inmates Due To Prison Overcrowding.

Where there is a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" on the same matter of federal law, *certiorari* may be granted. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); *Supreme Court Rule* 17.1. However, petitioners and cross-petitioners have failed to establish that the Circuit Court's opinion in *Union County, supra*, conflicts with opinions of other federal courts of appeal that have considered the constitu-

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*Cross-petitioners allege that, contrary to the Special Master and District Court, the Circuit Court failed to examine certain "objective criteria" as required by *Rhodes* (Cr. Pet. at 54 to 57). This contention is unavailing. Although cross-petitioners purport to find such objective criteria in the District Court's reference to Department of Corrections regulations on space, the argument fails because such regulations set forth optimal goals, but do not establish constitutionally required minimal standards. *Bell, supra*, 441 *U.S.* at 543, n. 27. It is significant that neither petitioners nor cross-petitioners cite any legislation which would prohibit double-celling; nor can they claim that double-celling is a practice condemned by the general public In fact, the cases cited by cross-petitioners reveal that double celling is widely practiced.

tionality of double-celling pre-trial detainees and sentenced inmates. Each case cited for this proposition is largely dependent upon its facts. In this situation, the Court should "adhere to the usual role of non-interference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations." *N.L.R.B., supra*, 340 U.S. at 503.

Subsequent to the Supreme Court decisions of *Bell* and *Rhodes*, the federal circuit courts of appeal have uniformly approached the constitutionality of double-celling pre-trial detainees and sentenced inmates by examining the totality of conditions at the prison. *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert.* denied, 103 S.Ct. 1438 (1983); *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983); *Villaneuva v. George*, 659 F.2d 851 (8th Cir. 1981); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982); *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983) appeal pending sub nom., *Meachum v. Battle*, 52 U.S.L.W. 3210 (1983). In *Union County*, the Third Circuit similarly adopted this totality analysis in contradistinction to the lower court's opinion, which focused largely on spatial considerations. (See discussion *supra*). Cross-petitioners' criticism of the Third Circuit opinion, that it impermissibly "parsed the consideration of living space from its assessment of the 'totality of the circumstances' " (Cr. Pet. at 41), is unfounded. The Third Circuit specifically considered recreational opportunities (Cr. Pet. App. D at 54 and 65), visitation privileges (*Ibid.*, at 56 and 65, n.29), cell size (*Ibid.*, at 56 and 64, n.28), the duration of confinement (*Ibid.*, at 56, n.18 and 63), the opportunity for time away from the cell block (*Ibid.*, at 56, n.17 and 64, n.29) the physical condi-

tion of jail facilities (*Ibid.*, at 65, n.30) and the mitigating effect of the county's performance of its obligations under the consent agreement (*Ibid.*, at 56 and 66), in concluding that double-bunking would not violate the Due Process Clause of the Fourteenth Amendment.

The totality test does not mean, as cross-petitioners apparently contend, that a court can combine conditions which are constitutional on an individual basis and hold these conditions unconstitutional when taken as a whole. *Hoptowit, supra*, 682 F.2d at 1246-7; *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981). Moreover, no Circuit has adopted this approach, because this would invite large scale federal court intervention into the administration of state jails. Rather, each challenged condition is examined to determine if it comports with the appropriate standard.

> Of course, each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions. . . . But the court's principal focus must be on specific conditions of confinement. It may not use the totality of all conditions to justify federal intervention requiring remedies more extensive than are required to correct Eighth Amendment violations [*Wright, supra*, 642 F.2d at 1133.]*

*Cross-petitioners are incorrect in their assertion that *Wright, supra*, 642 F.2d at 1129, was implicitly rejected by *Hoptowit, supra*, 682 F.2d at 1237 (Cr. Pet. at 54). The analyses of *Hoptowit* and *Wright* are virtually identical. Both cases adopt a totality approach, and both recognize that a court cannot combine constitutional conditions into an unconstitutional whole. Given this similarity, the fact that *Wright* was decided before *Rhodes* does not undercut its precedential value. Cross-petitioners are inaccurate in their contention that *Wright* has been repudiated by every Circuit since *Rhodes* (Cr. Pet. at 54) and cite no cases to support this proposition.

In focusing on double-bunking as an alternative to floor mattresses, the Third Circuit examined the specific condition of confinement which was challenged and did so, in the context of the prison environment, which includes the mitigating effect of the county's obligation under the consent agreement. Neither petitioners nor cross-petitioners have cited any circuit court decision which, given similar facts, utilizes an analysis in conflict with that followed by the Third Circuit in *Union County*.

All cases cited by petitioners and cross-petitioners are factually distinguishable from the instant matter. Specifically, reliance has been placed upon cases where prisoners were confined in their cells nearly 24 hours per day without the opportunity to move freely within cell corridors,* where the physical condition of the jail facility under consideration was deplorable,** where recreational

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Lareau, supra, 651 F.2d at 100 (prisoners locked either in their 65 square foot cells or in crowded dayrooms); *Lock v. Jenkins*, 681 F.2d 488, 492 (7th Cir. 1981) (pre-trial detainees spent nearly 22 hours per day locked in cells of 37 square feet); *Smith v. Fairman*, 690 F.2d 122, 124 (7th Cir. 1982), *cert.* denied, 103 S. Ct. 2125 (1983) (prisoners had as little as nine square feet of space and were confined in their cells for 20 to 23 hours per day; *Wellman, supra*, 715 F.2d at 274 (prisoners locked in cells with floor space of 17 square feet for 22 to 23½ hours per day); *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980) (prisoners confined 24 hours per day, except for showers three times per week, in cells allowing 17 square feet per inmate).

**Jones v. Diamond*, 636 F.2d 1364, 1372-3 (5th Cir. 1981), *cert.* dismissed sub nom., *Ledbetter v. Jones*, 453 U.S. 950 (1981) (conditions included filthy showers, lack of ventilation, lack of clean linen or clothing, dirty mattresses, a general climate of violence, sexual assaults, no facilities for recreation and a diet which was only minimally adequate); *Wellman, supra*, 715 F.2d at 274 (an Eighth Amendment violation was found because the prison was over 100 years old, had problems with plumbing and electrical wiring, was infested with rodents and insects, and routine maintenance was defective); *Battle v. Anderson*, 564 F. 2d 388, 403 (10th Cir. 1977) (physical facility devastated by

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opportunities were severely limited. *Lareau, supra,* 651 F.2d at 100-01, and where there were findings that the jail was characterized by a general climate of violence,* all contrary to the findings by the Special Master in this case. Moreover, cases cited by cross-petitioners from the Second and Tenth Circuit are now of questionable precedential value.** In contrast to these cases, the findings of the Special Master were generally favorable to respondent, with the exception of the use of floor mattresses (JA 74-JA78) (Cr. Pet. App. D at 58, n.19). To the extent, therefore, that the cases cited by petitioners and cross-petitioners have found conditions to be unconstitutional, it is a manifestation of divergent facts, not conflicting legal analyses. Given such factual distinctions, cross-petitioners have no basis upon which to conclude that other circuits would not have upheld the constitutionality of the conditions at Union County (Cr. Pet. at 42 to 43; 59 to 60).

The significance of the cases cited by petitioners and cross-petitioners lies in the fact that these cases exam-

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riots); *Ramos v. Lamm,* 639 F.2d 559, 568-9 (10th Cir. 1980), *cert.* denied, 450 *U.S.* 1041 (1981) (inadequate heat and ventilation, rodent infestation, exposed wiring in showers and soiled bedding).

**Jones, supra,* 636 F.2d at 1372-3; *Ruiz, supra,* 679 F.2d at 1172 (life at the jail characterized by a constant threat of violence and brutality); *Battle, supra,* 567 F.2d at 403; *Ramos, supra,* 639 F.2d at 570 (record supports deliberate indifference to the safety needs of inmates).

***Lareau,* 651 F.2d at 96, was decided prior to *Rhodes* and cites the Sixth Circuit opinion which the Supreme Court reversed in *Rhodes.* Furthermore, *Lareau's* analysis regarding detainees is questionable because it was the Second Circuit that was reversed in *Bell.* The Tenth Circuit cases of *Battle, supra,* 564 F. 2d at 388, and *Ramos, supra,* 639 F.2d at 559, were decided prior to *Rhodes* and the "degeneration standard" adopted therein is questionable in light of the Tenth Circuit's recent adoption of a totality of conditions analysis in *Battle, supra,* 708 F.2d at 1523.

ine double-celling in the context of other factors, i.e., the length of confinement, the opportunities that inmates have to leave their cells for other activities and the provision of services,* they reject an analysis of prison overcrowding which focuses strictly on spatial considerations,** and they recognize that prison conditions do not become unconstitutional through the aggregation of otherwise constitutional conditions. *** This is precisely the analysis which was utilized by the Third Circuit in *Union County*.

POINT IV

Petitioners' Argument That The Decision Of The Circuit Court Will Abridge Fundamental Rights Of The People Of Union County And Their Employees Is Frivolous And Does Not Warrant A Grant Of Certiorari.

Petitioners contend for the first time before any court that this Court should grant *certiorari* because certain fundamental rights of the citizens of Union County will be abridged by the Third Circuit's decision. Namely, it is argued that citizens of the county have a fundamental right to a "safe and secure jail" (Pet. at 9),**** a "right

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*Lareau, supra, 651 F.2d at 104; Ruiz, supra, 679 F.2d at 1148; Lock, supra, 681 F.2d at 495-5; Madyun v. Thompson, 657 F.2d 868, 872 n.5 (7th Cir. 1981) ("the constitutionality of double-celling involves an assessment of many factors, including *inter alia*, the duration of confinement, the size of the cells and the opportunities for inmates to leave their cells during the normal prison routine").

**Jones, supra, 636 F.2d 1375-76 (the court refused to order one person per cell and did not attempt to prescribe specific space standards); Lock, 681 F.2d at 494-5; Ruiz, supra, 679 F.2d at 1147 ("[n]either sixty square feet, nor forty square feet, nor any other measure is constitutionally ordained").

***Hoptowit, supra, 682 F.2d at 1247; Wright, supra, 642 F.2d at 1133; Wellman, supra, 715 F.2d at 275.

****The notation "Pet." refers to the petition for *certiorari* by William DiBuono, *et als.*

to be secure from . . . unnecessary financial damage" (*Ibid.*) and the "right to expect and provide safe working conditions for their jail staff" (Pet. at 10). However, these alleged rights are not analogous in character to other rights which the Supreme Court has recognized as fundamental. Specifically, the alleged rights have not "long been recognized as a basic right under the Constitution," *Shapiro v. Thompson*, 394 U.S. 618, 630-1 (1969), and are not "preservative of other civil and political rights," *Reynold v. Simms*, 377 U.S. 533, 561-2 (1964). Moreover, the key to determining whether a right is fundamental, lies in assessing whether . . . [the right] is explicitly or implicitly granted by the Constitution." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33, reh. den., 411 U.S. 959 (1973).

Petitioners do not argue that these alleged rights are explicitly found in the Constitution. Rather, they allege, without substantiation, that the rights arise implicitly from "penumbra guarantees" and the Ninth Amendment. Petitioners offer this Court no explanation regarding how or why the alleged rights should be recognized under the Ninth Amendment or the penumbra of other rights, nor do they offer any judicial authority for their position. Given petitioners' complete failure to articulate how these alleged rights can be found within the Ninth Amendment or the penumbra of the Bill of Rights, the non-existence of any judicial or statutory authority for their position and the dissimilarity in character of these alleged rights when compared with other fundamental rights previously recognized by the Supreme Court, petitioners' contentions are frivolous and certainly do not raise constitutional issues of such moment that *certiorari* should be granted.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition and cross-petition for a writ of *certiorari* should be denied.

Dated: February 20, 1984

Respectfully submitted,

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